MONTANA LEGISLATIVE HISTORY

Chapter 79 ☒ 2003

Bill H 77 S _____ Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	1-7	C	Hearing Date(s)	2-4	C
	1-16	C		3-6	C
		C			C
		C			C
Date Out	1-16	C	Date out	3-6	

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

LEGISLATIVE HISTORIES SINCE 1997

The scope and depth of legislative committee minutes varies by year and by committee. If you would like additional information about a hearing, you may want to determine whether the hearing was recorded. In addition, some recent floor debates were also recorded. For information on accessing or purchasing these recordings, contact the Historical Society Archives at 406-444-4774.

If you have concerns regarding the format of the enclosed committee minutes or the recordings of the hearings, it is suggested that you contact your state legislators.

2/24 REVISED FISCAL NOTE REQUESTED
3/05 REVISED FISCAL NOTE RECEIVED
3/05 REVISED FISCAL NOTE PRINTED
3/26 TABLED IN COMMITTEE
3/29 MISSED DEADLINE FOR APPROPRIATION BILL TRANSMITTAL

HB 75 INTRODUCED BY LAKE *LC0408 DRAFTER: LEE EVANS*

EXTEND PESTICIDE DISPOSAL PROGRAM

BY REQUEST OF DEPARTMENT OF AGRICULTURE

8/22 FISCAL NOTE NEEDED
12/12 INTRODUCED
12/17 FISCAL NOTE REQUESTED
12/20 REFERRED TO AGRICULTURE
1/09 HEARING
1/10 FISCAL NOTE RECEIVED
1/10 FISCAL NOTE PRINTED
2/05 TABLED IN COMMITTEE
2/28 MISSED DEADLINE FOR GENERAL BILL TRANSMITTAL

HB 76 INTRODUCED BY MCKENNEY *LC0455 DRAFTER: MCCLURE*

ESTABLISH CERTIFIED REGIONAL DEVELOPMENT CORPORATIONS AND TREASURE COMMUNITIES

BY REQUEST OF DEPARTMENT OF COMMERCE

12/13	INTRODUCED		
12/17	FISCAL NOTE REQUESTED		
12/20	REFERRED TO BUSINESS AND LABOR		
1/10	FISCAL NOTE RECEIVED		
1/10	FISCAL NOTE PRINTED		
1/23	HEARING		
1/24	COMMITTEE EXECUTIVE ACTION—BILL PASSED AS AMENDED	17	1
1/25	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/31	2ND READING PASSED	91	8
1/31	FISCAL NOTE RECEIVED		
2/01	FISCAL NOTE PRINTED		
2/01	3RD READING PASSED	88	8
	TRANSMITTED TO SENATE		
2/03	REFERRED TO BUSINESS AND LABOR		
3/10	HEARING		
3/13	COMMITTEE EXECUTIVE ACTION—BILL CONCURRED AS AMENDED	10	0
3/13	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/15	2ND READING CONCURRED ON VOICE VOTE	47	0
3/17	3RD READING CONCURRED	43	6
	RETURNED TO HOUSE WITH AMENDMENTS		
4/07	2ND READING SENATE AMENDMENTS CONCURRED	99	0
4/08	3RD READING PASSED AS AMENDED BY SENATE	95	5
4/08	SENT TO ENROLLING		
4/09	RETURNED FROM ENROLLING		
4/10	SIGNED BY SPEAKER		
4/10	SIGNED BY PRESIDENT		
4/11	TRANSMITTED TO GOVERNOR		
4/16	SIGNED BY GOVERNOR		
4/17	CHAPTER NUMBER ASSIGNED		
	CHAPTER NUMBER 351		
	EFFECTIVE DATE: 4/16/2003 - SECTIONS 1 AND 3-9		
	EFFECTIVE DATE: 7/01/2003 - SECTION 2		

HB 77 INTRODUCED BY JENT *LC0133 DRAFTER: MACMASTER*

POST CONVICTION DNA TESTING

BY REQUEST OF DEPARTMENT OF JUSTICE

12/13	INTRODUCED		
12/17	FISCAL NOTE REQUESTED		
12/20	REFERRED TO JUDICIARY		
1/07	HEARING		
1/15	FISCAL NOTE RECEIVED		
1/16	COMMITTEE EXECUTIVE ACTION—BILL PASSED AS AMENDED	18	0
1/16	FISCAL NOTE PRINTED		

1/17	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/22	2ND READING PASSED	100	0
1/23	3RD READING PASSED	98	1
	TRANSMITTED TO SENATE		
1/25	REFERRED TO JUDICIARY		
2/04	HEARING		
3/06	COMMITTEE EXECUTIVE ACTION—BILL CONCURRED	8	1
3/06	COMMITTEE REPORT—BILL CONCURRED		
3/07	2ND READING CONCURRED ON VOICE VOTE	50	0
3/08	3RD READING CONCURRED	43	0
	RETURNED TO HOUSE		
3/10	SENT TO ENROLLING		
3/11	RETURNED FROM ENROLLING		
3/12	SIGNED BY SPEAKER		
3/12	SIGNED BY PRESIDENT		
3/12	TRANSMITTED TO GOVERNOR		
3/19	SIGNED BY GOVERNOR		
3/20	CHAPTER NUMBER ASSIGNED		
	CHAPTER NUMBER 79		
	EFFECTIVE DATE: 10/01/2003 - ALL SECTIONS		

HB 78 INTRODUCED BY BRANAE *LC0288 DRAFTER: C. ERICKSON*

TRUSTEES TO DETERMINE CONDUCT OF SCHOOL ON SATURDAYS IN EMERGENCY

BY REQUEST OF OFFICE OF PUBLIC INSTRUCTION

12/13	INTRODUCED		
12/20	REFERRED TO EDUCATION		
1/15	HEARING		
1/16	COMMITTEE EXECUTIVE ACTION—BILL PASSED AS AMENDED	14	0
1/16	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/20	2ND READING PASSED	98	0
1/21	3RD READING PASSED	100	0
	TRANSMITTED TO SENATE		
1/22	REFERRED TO EDUCATION AND CULTURAL RESOURCES		
1/29	HEARING		
1/30	COMMITTEE EXECUTIVE ACTION—BILL CONCURRED	9	0
1/30	COMMITTEE REPORT—BILL CONCURRED		
2/03	2ND READING CONCURRED ON VOICE VOTE	49	0
2/04	3RD READING CONCURRED	48	0
	RETURNED TO HOUSE		
2/05	SENT TO ENROLLING		
2/06	RETURNED FROM ENROLLING		
2/06	SIGNED BY SPEAKER		
2/07	SIGNED BY PRESIDENT		
2/10	TRANSMITTED TO GOVERNOR		
2/13	SIGNED BY GOVERNOR		
2/13	CHAPTER NUMBER ASSIGNED		
	CHAPTER NUMBER 21		
	EFFECTIVE DATE: 2/13/2003 - ALL SECTIONS		

HB 79 INTRODUCED BY JACKSON *LC0385 DRAFTER: MACMASTER*

IMMUNITY FOR PRIVATE ASSOCIATIONS FOR MARKING OBSTRUCTIONS IN WATERWAYS

12/13	INTRODUCED		
12/20	REFERRED TO BUSINESS AND LABOR		
1/08	HEARING		
1/14	COMMITTEE EXECUTIVE ACTION—BILL PASSED AS AMENDED	10	8
1/14	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/24	2ND READING PASSED	50	48
1/24	FISCAL NOTE RECEIVED		
1/25	3RD READING PASSED	54	44
	TRANSMITTED TO SENATE		
1/25	FISCAL NOTE PRINTED		
1/27	REFERRED TO NATURAL RESOURCES		
1/28	REREFERRED TO FISH AND GAME		
2/11	HEARING		
2/12	COMMITTEE EXECUTIVE ACTION—BILL CONCURRED	10	0
2/12	COMMITTEE REPORT—BILL CONCURRED		
2/13	2ND READING CONCURRED ON VOICE VOTE	48	0

HOUSE BILL NO. 77

INTRODUCED BY L. JENT

BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PROCEDURE FOR DNA TESTING OF A PERSON CONVICTED OF A FELONY WHO IS SERVING A TERM OF INCARCERATION AND WHO DID NOT PLEAD GUILTY TO THE FELONY; AND REQUIRING THE STATE TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE THAT THE STATE HAS REASON TO BELIEVE CONTAINS DNA MATERIAL AND THAT IS OBTAINED IN CONNECTION WITH A FELONY FOR WHICH A CONVICTION IS OBTAINED AGAINST A PERSON WHO DID NOT PLEAD GUILTY."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Petition for DNA testing.** (1) A person convicted of a felony who is serving a term of incarceration and who did not plead guilty to the felony may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney in the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence to be tested:

(i) was secured in relation to the trial that resulted in the conviction;

(ii) is available; and

(iii) is in a condition that would permit the requested testing;

(b) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(d) the petitioner has made a prima facie showing that the evidence sought to be tested is material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(e) the requested testing results would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction; and

(f) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must

be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney in the county of conviction. If the parties cannot agree on a laboratory, the court shall direct the state crime laboratory to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory in this state to give the testing priority over any other pending casework of the laboratory.

(8) The test results must be fully disclosed to the parties.

(9) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results are not favorable to the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(10) If the test results are favorable to the petitioner, the court shall order a hearing and after the hearing shall make appropriate orders pursuant to applicable statutes regarding postconviction proceedings.

(11) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(12) The grant or denial of a petition or hearing under this section is not appealable.

(13) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

NEW SECTION. **Section 2. Preservation and disposal of scientific identification evidence obtained in criminal proceeding.** (1) The state shall preserve scientific identification evidence that the state

has reason to believe contains DNA material and that is obtained in connection with a felony for which a conviction is obtained against a person who did not plead guilty. The state shall preserve the evidence for 3 years after the imposition of sentence or for any period beyond 3 years that is required by a court order issued within 3 years after the imposition of sentence.

(2) The state may propose to dispose of scientific identification evidence before the expiration of the time period described in subsection (1) if the state notifies the convicted person and any attorney of record for the convicted person. The notification must include a description of the scientific identification evidence, a statement that the state will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within that 120-day period, the state may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system.

(3) If a party objects to the disposition of the scientific identification evidence, the state has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

NEW SECTION. **Section 3. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 46, chapter 21, and the provisions of Title 46 apply to [sections 1 and 2].

- END -

FISCAL NOTE

Bill #: HB0077 **Title:** Post conviction DNA testing

Primary Sponsor: Jent, L **Status:** As Introduced - Revised

Sponsor Signature Date Chuck Swysgood, Budget Director 1/14/03 Date

Fiscal Summary

	FY 2004 Difference	FY 2005 Difference
Expenditures:		
General Fund	$0	$0
Revenue:		
General Fund	$0	$0
Net Impact on General Fund Balance:	$0	$0

☐ Significant Local Gov. Impact ☐ Technical Concerns

☐ Included in the Executive Budget ☐ Significant Long-Term Impacts

☐ Dedicated Revenue Form Attached ☐ Needs to be included in HB 2

Fiscal Analysis

ASSUMPTIONS:

Judiciary

1. This bill would allow individuals serving a term of incarceration for a felony to receive DNA testing to dispute the conviction.
2. Specific requirements qualifying inmates for the test are enumerated in the bill.
3. The bill requires the state to pay for DNA tests where petitioners (inmates) are unable to pay. Therefore there is no fiscal impact to the judicial branch.

Department of Corrections

4. A total of 61 percent (1380 of 2260 on 12/24/02) of incarcerated felons have DNA samples on record. The number in the unsampled group who did not plead guilty is undetermined. Cost per DNA test is $2.50 for a kit and $75 to $100 for processing, depending on the sample.
5. Providing legal assistance in petition preparation increases the DOC legal contracted services by $1,200 per annum.
6. There will be no significant fiscal impact to the DOC beyond the recommended budget.

Department of Justice

7. The fiscal impact to the department will be absorbed with existing resources.

HB 77

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 7, 2003 at 9 a.m. in Room 137 Capitol.

ROLL CALL

Members Present:
Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 77, 1/7/2003; HB 66, 1/7/2003; HB 84, 1/7/2003
Executive Action: None

HEARING ON HB 77

Sponsor: REP. LARRY JENT, HD 29, Bozeman

(Technical Difficulties, Tape Recorder Not Working)

Opening Statement by Sponsor:

REP. LARRY JENT, HD 29, Bozeman, opened on HB 77, Post Conviction DNA testing. **REP. JENT** stated that this bill provides a procedure for DNA testing of a person convicted of a felony who is serving a term of incarceration and who did not plead guilty to the felony. The bill requires the state to preserve scientific identification evidence that the State has reason to believe contains DNA material and that is obtained in connection with a Felony for which a conviction is obtained against a person who did not plead guilty. **REP. JENT** stated that he prosecuted the first DNA case in Montana, State of Montana v. Larry Moore, as well as a couple of federal DNA cases, and a case involving a homicide in Park County. **REP. JENT** stated that DNA testing is reliable, well established and performed by the Montana State Crime Lab and crime labs all over the Country. The elements of this Bill track State v. Klein which sets forth a 5 part test for Post Conviction Review. First, the convicted person must file a petition with the District Court alleging they did not commit the crime, and that there is a DNA test showing someone else is the perpetrator. (See sections a-f of Section 1.)

Post Conviction Review allows a person convicted to appeal based on new evidence that was not available to the Court at the time of the conviction. This Bill aims to establish a procedure so that not everyone is filing post conviction review. In summary, HB 77 establishes a procedure for interested parties to follow when a convicted person claims they are innocent and a DNA test could exonerate them.

EXHIBIT(juh02a01)

Proponents' Testimony:

Attorney General Mike McGrath, supported HB 77 stating that it establishes a procedure for Petitioners and the District Court when there is a claim of actual innocence and DNA could exonerate a Defendant. DNA testing exonerated defendant Ray Bromgard after serving 15 years in prison. **Mr. McGrath** stated that the Brombard case is a travesty and this bill provides a procedure to prevent this from happening again. The bill sets up three criteria: The petitioner must claim they are innocent, there must be a sample to be tested; and the test results must illustrate a tangible

difference from the case in which the defendant was convicted. **Mr. McGrath** proposed Amendments, to strike the language contained on p.3, line 25, granting or denying petitions or hearings for appeal; and amend p. 4, line 2 to read "a conviction is obtained against a person who did not plead guilty. The State shall preserve the evidence for a minimum of three years. **Mr. McGrath** stated that he is opposed to all amendments offered by Professor Jeff Renz.

EXHIBIT(juh02a02)

Professor Jeff Renz, Missoula, appeared on his own behalf in support of HB 77. **Mr. Renz** submitted numerous proposed amendments. **Mr. Renz** directs the Criminal Defense Clinic at the University of Montana School of Law. He teaches scientific evidence which includes two sessions on DNA evidence. **Mr. Renz** stated that in 1996, a USDOJ report noted that the FBI's DNA lab exonerated 25% of the prime suspects referred to them. Approximately one out of three, to one out of four eyewitness identifications are faulty. **Mr. Renz** stated that the opportunity for DNA testing ought to extend to Petitioners that plead guilty to crimes they did not commit. He stated that innocent defendants sometimes plead guilty to crimes they did not commit in order to avoid a more severe sentence should they proceed to trial and lose. Another USDOJ report notes that of 28 people exonerated by DNA, six had confessed. A Petitioner should not be required to demonstrate a chain of custody when the evidence is in the state's control. A Petitioner should be required to show the DNA result would have been a significant factor in his case. No more should be required of a petitioner at this stage. **Mr. Renz** offered numerous more amendments to HB 77 including a new section entitled Prevention and correction of fraudulent testimony. (See exhibit 3, p. 5., line 3.)

EXHIBIT(juh02a03)

William Hooks, Attorney, Helena, supported HB 77. **Mr. Hooks** represented Defendants Jimmy Bromgard and Chester Bauer. Jimmy Bromgard served 15 years for a crime he did not commit. Chester Bauer served nine years for a crime he did not commit. In each case, outdated expert testimony, hair analysis, was used to convict. Later DNA testing exonerated both men of their crimes. HB 77 will assist in helping find the real perpetrators of these crimes.

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. LASZLOFFY asked **REP. JENT** about whether this will affect parolees or those on probation since the language of the Bill addresses only those incarcerated. **REP. JENT** responded that those individuals have other recourse for release such as post conviction review of evidence not available to the court at the time of conviction.

REP. HARRIS asked **Attorney General McGrath's** view on Mr. Renz's proposed Amendments. **Mr. McGrath** stated he opposes all Mr. Renz's amendments and that Mr. Renz is attempting to rewrite the bill.

REP. HARRIS asked **Attorney General McGrath** whether a conflict could occur in a situation where there is a hair at the crime lab then a DNA test is conducted a year later. **Attorney General McGrath** stated there would not be a conflict and that they are separate sections of the lab. Each division of the crime lab makes decisions independently.

REP. GALLUS asked **Attorney General McGrath** about an Alford Plea to which **Attorney General McGrath** stated this bill is not for people who plead guilty.

REP. RICE asked **Attorney General McGrath** who will pay the costs of DNA testing. **Attorney General McGrath** replied the Department of Justice would pay, unless the Petitioner was able. **Attorney General Mcgrath** stated it will not cost much as the crime lab conducts the test routinely.

REP. NOENNIG asked **REP. JENT** his position on Professor Renz' Amendment regarding guilty pleas. **REP. JENT** supports the AG's amendments and stated we don't want to draft or amend legislation that would lead to completely rewriting the entire post conviction statute. **REP. NOENNIG** asked about guilty pleas that want DNA testing. **REP. JENT** responded, in that case, they can go to federal court if they cannot file under the statute. **REP. JENT** stated that this could be a problem with a Defendant who plead guilty who is not guilty. He stated he has never done an Alford Plea and he does not believe in them. There are some instances, however, where a person confessed and DNA would exonerate them.

CHAIRMAN SHOCKLEY asked **Attorney General McGrath** to explain Nolo Contendre and an Alford Plea. **Mr. McGrath** stated the Alford Plea came from North Carolina v. Alford. An Alford Plea means the court can accept a guilty plea even if the defendant states he

did not commit the crime, due to overwhelming evidence to the contrary. To accept an Alford Plea, the Judge must find that Defendant entered the plea voluntarily and was not under duress. **Mr. Renz** offered rebuttal that DNA will prove guilt as well as innocence. and that DNA can stick around a long time. He cited the Czar's bones as an example where DNA over 100 years old is still eligible for testing. **Mr. Renz** stated that even DNA which is tainted or mixed with something else can be tested and identified.

Closing by Sponsor:

REP. JENT stated HB 77 is important to Montana. He believes this bill will provide a procedure for the State of Montana, district court judges, the petitioner, and the crime lab to follow in a claim of actual innocense. **REP. JENT** supports Mr. McGrath's two amendments and opposes some but not all of Professor Renz's proposed amendments. In particular, where a defendant wrongfully plead guilty, **REP. JENT** would not oppose an amendment to extend DNA testing to the Petitioner if the DNA proves they are innocent.

HEARING ON HB 66

Sponsor: **REP. HARRIS, HD 30, Bozeman**

Opening Statement by Sponsor:

REP. HARRIS stated HB 66 is an act clarifying the law relating to the Attorney General's role in Bankruptcy and debt collection proceedings; providing that the Attorney General shall represent the state in Bankruptcy proceedings in which the state is a party or has an interest; providing that the Attorney General may act in an advisory capacity in state debt collection proceedings; Amending Sections 2-15-501 and 2-15-503, MCA. Some state agencies have continued to appear in bankruptcy matters despite the fact that existing law states they should be referred to the Bankruptcy Unit with the Attorney General's office. As a result, the state fails to appear and defend its interests in many bankruptcies or does so in a less effective manner. HB 66 will correct this problem by providing that in any bankruptcy case involving an interest of a state agency, the state must be represented by the Bankruptcy Unit. It will provide a central point of contact for all bankruptcy matters, allow a coordinated effort by all affected agencies, and allow the state to better manage the anticipated growth of large business and consumer bankruptcies.

EXHIBIT 1
DATE 1/27/03
HB 77

DEPARTMENT OF JUSTICE
HB 77: Post-Conviction DNA Testing

Background

The Montana Crime Lab has the capability to do DNA testing. DNA is analyzed in body fluids, stains and other biological tissues recovered from evidence. This analysis can associate victims and/or suspects with each other or with a crime scene.

As this technology is relatively new, there is an increasing demand for DNA testing in cases where defendants were convicted before DNA testing was available. Post-conviction testing, who should get it and how the results should be handled present a number of significant management, financial and legal considerations.

Criteria for Testing

This bill seeks to establish a procedure for the Crime Lab to determine when testing on an old case is required. Under HB 77, three criteria must be met prior to the performance of post-conviction DNA testing:

- There must be a claim of innocence. Testing will not be an option if, for example, the defendant admitted the crime or pled guilty.
- There must be a valid sample. If the conditions of the original case were such that samples were not collected or were not preserved, testing would not be possible. Also, if the evidence had been tampered with, contaminated, altered or replaced, testing would not occur.
- The results of testing must illustrate a tangible difference in the case. A post-conviction test of materials from a rape kit, for example, would be insignificant if the case involved bodily fluids related to a different type of assault.

Testing

Testing must be conducted by a laboratory agreed upon by the petitioner, attorney general and county attorney. If the parties cannot agree, the court will order the state's crime lab to conduct the tests.

Test results must be disclosed to the parties involved.

- If the tests exonerate the petitioner, his or her status may be resolved through post-conviction proceedings.
- If the tests are inconclusive, further tests may be ordered or the process may be terminated.
- If the tests are "unfavorable" to the petitioner, the sample must be included in the state's DNA identification index and in the federal combined DNA index system. Victims and/or victims' families must be notified and the process then terminated.

--over--

Preservation of evidence

Under HB 77, in cases in which a person does not plead guilty and is later convicted, the state must maintain evidence that is believed to contain DNA material for three years.

Summary of HB 77

Post-conviction DNA testing and the issues related to it are largely "uncharted waters" in Montana and around the nation. HB 77 will put in a place a specific protocol for requesting and conducting tests, and for addressing the outcome of those tests.

2003 Legislature
January 7, 2003

EXHIBIT 2
DATE 1/7/03
HB 77

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Last printed 1/6/2003 3:37 PM

dna.amend.doc

House Bill No. 77

Introduced By L. Jent

By Request of the Department of Justice

Proposed Amendments from the A.C.

p. 3, line 25. ~~12 The grant or denial of a petition or hearing under this section is not appelable.~~

p. 4, line 2. conviction is obtained against a person who did not plead guilty. the state shall preserve the evidence for a minimum of 3

-END-

EXHIBIT 3
DATE 1/7/03
HB 77

Jeffrey T. Renz & Associates
Attorney at Law
13900 Hampton Drive
Clinton, Montana 59825-9718
406-258-6462
paragon@bigsky.net

January 6, 2003

Rep. James Shockley, Chairman
House Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Rep. Shockley:

I appear today on my own behalf in support of HB 77, with proposed amendments. I offer a short statement of my bona fides. I direct the Criminal Defense Clinic at The University of Montana School of Law. During Spring Semester I teach a component on scientific evidence, which includes two sessions on DNA evidence.

I hold a B.A. in Botany from The University of Montana. In 1977, I testified as an expert biologist on behalf of the State of Illinois in the case of Illinois v. City of Milwaukee, the largest water pollution case U.S. history.

HB 77 should not be viewed as a get out of jail free card. We should recognize that it offers a new and powerful tool to ensure that we arrest and incarcerate the people who commit a crime–people who would otherwise remain at large while an innocent suffered in prison In 1996, a U.S. Department of Justice report noted that the FBI's DNA lab exonerated 25% of the prime suspects (mainly those who had been identified by eye-witnesses) who had been referred to them. When Director Louis Freeh visited the University of Montana Law School several years later, he reported that the rate had risen to as high as 33%. In short, between 1 in 4 and 1 in 3 eyewitness identifications are faulty.

I have reviewed Rep. Jent's draft of HB 77. To ensure that the innocent are freed and the guilty found, I offer several proposed changes.

First, because some innocent defendants plead guilty to crimes that they did not commit in order to avoid a more severe sentence after a trial that they may lose, the opportunity for DNA testing ought to extend to them, too. This is the reason for the amendment to Section 1(1). (The USDoJ report notes that of 28 people exonerated by DNA, six had confessed! Of the same 28, seven were fingered by hair "evidence.")

We should not require a petitioner to demonstrate a chain of custody when the evidence

to be tested has been in the state's possession or control. I have also added a provision that permits the judge to find that the testing of the evidence will demonstrate its validity. This is based on a similar provision in the Wisconsin Code. Section 1(5).

We should require the petitioner to show that the DNA result would have been a significant factor in his case. No more should be required of a petitioner at this stage, since we are asking the court only to find that DNA evidence should be tested. Section 1(5)(c).

In Section 1(6), the judge should be permitted to order any laboratory to conduct the testing if the parties cannot agree on a lab. The state crime lab should not be the default laboratory in cases in which the DNA testing result may call into question earlier scientific results from the state crime lab.

In Section 1(9), the court should not be called upon to explain the results of DNA testing to the victim. The report should speak for itself. The House should also think about sending all reports to victims, whether or not they implicate the petitioner. It may be important for victims to know that their attacker remains at large.

I have proposed the enclosed amendment to 1(10), because DNA evidence may often be accompanied by a witness's change of heart or the true assailant's confession. Note that this provision would permit the state to offer after-acquired evidence and it is therefore even-handed.

A denial of a request for DNA testing, which is typically brought on behalf of an innocent prisoner in the court that convicted him, should be reviewed by a court of appeals. That is why I have proposed the change to Section 1(12).

Section 1(14) has been added because Jimmy Bromgard waited five years for the Innocence Project to take his case. If we applied the one year statute of limitations of the Post-conviction Hearing Act, Bromgard would have remained in prison.

Section 1(15) has been added because the state is compelled to raise legal defenses to post-conviction petitions. This would release the state from its duty to raise a technical defense to the release of an innocent prisoner.

Finally, Section 3 has been added. As to this I offer the following, from a hornbook on statistics in criminal trials. The following refers to the famous Dreyfus affair in French history.

> In the 1899 retrial of the 1894 secret court-martial of Alfred Dreyfus. . . the prosecution again sought to prove that Dreyfus was the author of a handwritten [note]. * * * The famous criminologist Alphonse Bertillon testified that there were suspicious coincidences of the initial and final letters in four . . . words. . . . Bertillon argued that the probability of

four sets of coincidences was $0.2^4 = 0.0016$ in normal writing. [Dreyfus was again found guilty.]* * * *

The 1899 verdict was widely recognized as a manifest injustice; there was an international outcry and Dreyfus was immediately pardoned on health grounds. The Dreyfus family eventually obtained review of the court martial by the civil court of appeals. As part of its investigation, the court requested the Academie des Sciences to appoint an expert panel to examine and report on the expert evidence. The panel–which included Henri Poincaré, a famous professor of the calculus of probabilities at the Sorbonne–pronounced it worthless. They added that, "its only defense against criticism was its obscurity, even as the cuttle-fish cloaks itself in a cloud of ink in order to elude its foes."

M. Finkelstein and B. Levin, Statistics for Lawyers 73-73 (2d Ed. 2001).

When I read the testimony of the Director of the Montana Crime Lab in the Bromgard case, I was stunned. The impropriety of the testimony leapt from the page. The state's expert in the Bromgard case had committed a century-old sin. Worse, he went further than had Mssr. Bertillon. It is inconceivable to me that such testimony, discredited at the end of the 19th Century was offered at the end of the 20th. No reasonable scientist would have offered the testimony. It was indefensible. No conviction, obtained by such fraud, should ever be permitted to stand unchallenged.

Sincerely,

Jeffrey T. Renz

c: Attorney General's Office

HOUSE BILL NO. 77

INTRODUCED BY L. JENT

BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PROCEDURE FOR DNA TESTING OF A PERSON CONVICTED OF A FELONY WHO IS SERVING A TERM OF INCARCERATION AND WHO DID NOT PLEAD GUILTY TO THE FELONY; AND REQUIRING THE STATE TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE THAT THE STATE HAS REASON TO BELIEVE CONTAINS DNA MATERIAL AND THAT IS OBTAINED IN CONNECTION WITH A FELONY FOR WHICH A CONVICTION IS OBTAINED AGAINST A PERSON WHO DID NOT PLEAD GUILTY."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Petition for DNA testing.** (1) A person convicted of a felony who is serving a term of incarceration or who remains under state supervision ~~and who did not plead guilty to the felony~~ may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) assert that, to the best of the petitioner's knowledge and belief, the evidence containing DNA is in the custody or control of the state or present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney in the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that ~~the petition is not made for the purpose of delay and that~~:

(a) the evidence to be tested:

~~(i) was secured in relation to the trial that resulted in the conviction;~~

~~(ii)~~ (i) is available; and

~~(iii)~~ (ii) is in a condition that would permit the requested testing;

(b) the evidence to be tested:

(i) has been in the custody or control of the state;

(ii) the evidence has been in the custody of another person and has been subject to a chain of custody sufficient to establish that it has not been substituted~~, tampered with, degraded, contaminated, altered,~~ or replaced in any material aspect; or

(iii) the testing itself will establish the integrity of the evidence.

(c) the identity of the perpetrator of the felony was or ~~should have been~~ , if testing were to exclude the petitioner, would have been a significant issue in the case;

~~(d) the petitioner has made a prima facie showing that the evidence sought to be tested is material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;~~

(e) a reasonable probability exists that testing of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgement of conviction; and

(f) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating ~~and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction~~ or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney in the county of conviction. If the parties cannot agree on a laboratory, the court shall ~~direct the state crime laboratory to conduct the testing~~ decide which laboratory proposed by the parties shall conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court ~~shall~~ may order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory in this state to give the testing priority over any other pending casework of the laboratory.

(8) The test results must be fully disclosed to the parties.

(9) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results are not favorable to the petitioner, the court shall:

(a) ~~notify~~ provide a copy of the report to the board of pardons and parole;

(b) order the petitioner's test ~~sample~~ results to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) ~~notify~~ provide a copy of the test results to any victim and the family of the victim ~~that the test results were not favorable to the petitioner~~; and

(d) terminate the proceeding.

(10) If the test results are favorable to the petitioner, the court shall order a hearing and after the hearing shall make appropriate orders pursuant ~~to applicable statutes regarding postconviction proceedings~~ part two of this chapter. At such a hearing, the court may receive, in addition to DNA testing results, all other relevant evidence whether or not introduced at trial.

(11) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional

testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(12) The ~~grant or~~ denial of a petition or hearing under this section ~~is not appealable~~ is appealable as provided by section 46-21-203.

(13) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

(14) A petition pursuant to this part may be filed at any time during which the petitioner is incarcerated or under state supervision.

(15) A petition may be filed pursuant to this part notwithstanding the petitioner's failure to appeal and notwithstanding the filing of any petition or petitions pursuant to part one of this chapter.

NEW SECTION. **Section 2. Preservation and disposal of scientific identification evidence obtained in criminal proceeding.** (1) The state shall preserve scientific identification evidence that the state has reason to believe contains DNA material and that is obtained in connection with a felony for which a conviction is obtained against a person during the period in which that person remains incarcerated or remains under state supervision. ~~who did not plead guilty. The state shall preserve the evidence for 3 years after the imposition of sentence or for any period beyond 3 years that is required by a court order issued within 3 years after the imposition of sentence~~.

(2) The state may propose to dispose of scientific identification evidence before the expiration of the time period described in subsection (1) if the state notifies the convicted person and any attorney of record for the convicted person. The notification must include a description of the scientific identification evidence, a statement that the state will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within that 120-day period, the state may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system. The court must hold a hearing on the proposed disposition before the court may issue an order permitting the state to dispose of scientific identification evidence.

(3) If a party objects to the disposition of the scientific identification evidence, the state has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

(4) A convicted person may appeal from any order authorizing the state to dispose of the disputed evidence.

NEW SECTION. **Section 3. Prevention and correction of fraudulent testimony.** If, in the course of any proceeding conducted pursuant to part two of this chapter, the court concludes that any officer or employee of the state knew or should have known that the testimony that he or she offered was false or that such officer or employee testified with reckless disregard for the truth of the matter asserted or the reliability of the opinion offered in a prior proceeding and that such testimony was material to the proceeding, the court shall vacate the petitioner's sentence or conviction and order a new trial or a new sentencing hearing.

NEW SECTION. **Section ~~3~~ 4. Codification instruction.** [Sections 1, ~~and~~ 2, and 3] are intended to be codified as an integral part of Title 46, chapter 21, and the provisions of Title 46 apply to [Sections 1, ~~and~~ 2, and 3].

- END -

HOUSE OF REPRESENTATIVES
Roll Call
JUDICIARY COMMITTEE

DATE 1/30/03

	NAME	PRESENT	ABSENT	EXCUSED
(18)	REP. JIM SHOCKLEY, CHAIRMAN	✓		
1	REP. JEFF LASZLOFFY, VICE CHAIR MAJORITY	✓		
2	REP. PAUL CLARK, VICE CHAIR MINORITY	✓		
16	REP. GEORGE EVERETT	✓		
7	REP. TOM FACEY	✓		
8	REP. STEVE GALLUS	✓		
(15)	REP. GAIL GUTSCHE	✓		
(6)	REP. CHRISTOPHER HARRIS	✓		
4	REP. MIKE LANGE	✓		
(12)	REP. BRUCE MALCOLM	✓		
17	REP. BRAD NEWMAN	✓		
11	REP. MARK NOENNIG	✓		
(9)	REP. JOHN PARKER	✓	NV	
10	REP. HOLLY RASER	✓		
5	REP. DIANE RICE	✓		
(3)	REP. SCOTT SALES			
14	REP. RON STOKER	✓		
13	REP. BILL THOMAS	✓		

/s/JudicRollCall.2003

Montana House of Representatives
Visitors Register

JUDICIARY COMMITTEE **Date** 1/7/03

Bill No. HB 77 **Sponsor(s)** L. Jent

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

Name and Address	Representing	Support	Oppose	Inf.
Jeff Ray				
13900 Hampton, Clin	For Self	✓		✓
William Hooks		✓		✓
829 E 6th Helena	Self			
Bill Lange	DOJ	✓		
2679 Palmer Hsa				
Mike Meloy	AG	✓		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 16, 2003 at 8 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 195, 1/16/2003; HB 197, 1/16/2003; HB 199, 1/16/2003; HB 200, 1/16/2003
Executive Action: HB 200; HB 57; HB 141; HB 15; HB 77

EXECUTIVE ACTION ON HB 15

Motion: **REP. NEWMAN** moved that **HB 15 DO PASS.**

{Tape: 3; Side: B; Approx. Time Counter: 329 - 340}

Discussion:

REP. RASER stated she is not proposing amendments.

Vote: **Motion carried unanimously 18-0 voice vote.**

EXECUTIVE ACTION ON HB 57

Motion: **REP. GUTSCHE** moved that **HB 57 DO PASS.**

Discussion:

The committee discussed Jacobson's bill regarding a failure to stop also known as the hit-and-run bill. **REPS. NOENNIG** and **HARRIS** discussed leaving the scene and different scenarios such as a one-car accident or hitting a deer and going for help. **REP. GUTSCHE** passed out an email she received regarding the breakdown of states which have hit-and-run laws. She reported there are 41 states which make a hit-and-run resulting in serious bodily injury or death, a felony. **REPS. NOENNIG** and **HARRIS** stated they have problems with the bill's language as drafted due to the seriousness of becoming a felony. **REPS. STOKER, HARRIS, GUTSCHE** and **NEWMAN** spoke at length about amending this bill.

Exhibit (10)

Motion/Vote: **REP. CLARK** moved that **HB 57 BE TABLED. Motion carried unanimously 16-0 voice vote.**

EXECUTIVE ACTION ON HB 77

Motion: **REP. GALLUS** moved that **HB 77 DO PASS.**

{Tape: 4; Side: A; Approx. Time Counter: 69 - 72}

Motion: **REP. SHOCKLEY** moved that **HB 77 BE AMENDED.**

Discussion:

The committee discussed HB 77 and aspects of post-conviction DNA testing. **Mr. McMaster** passed out amendments and explained them

to the committee regarding decisions concerning guilty pleas for crimes one did not commit. He stated changes will be made to give the court the choice of which lab would be used unless the lab is out of state. **CHAIRMAN SHOCKLEY** asked REP. CLARK to take over as CHAIRMAN. **REPS. SALES, FACEY, NOENNIG, HARRIS, PARKER, LANGE** and **NEWMAN** discussed a sunset provision in the bill.

{Tape: 4; Side: A; Approx. Time Counter: 73 - 122}

Vote: Motion TO AMEND HB 77 carried unanimously 16-0 voice vote.

{Tape: 4; Side: A; Approx. Time Counter: 123 - 175}

Discussion:

The committee discussed evidence and the chain of custody. **REP. HARRIS** stated to put the burden on the prisoner's shoulders to show chain of custody is not fair. He stated Professor Renz submitted some amendments to change that part of the bill. **REP. HARRIS** stated he wished to move Professor Renz's amendments because the state had control of the evidence not the prisoner and these provide safeguards.

Motion/Vote: REP. HARRIS moved that **HB 77 BE FURTHER AMENDED** (Professor Renz's amendments). **Motion to further amend carried unanimously 18-0 voice vote.**

Discussion:

REPS. NOENNIG, PARKER, SHOCKLEY, HARRIS, CLARK and **FACEY** discussed REP. JENT'S amendments. Committee discussed whether to consider the Jent Amendments. **REP. FACEY** read the parliamentary procedure on bringing up a bill previously voted on but not reported out of committee. He stated a motion to reconsider further amendments could be considered. **REP. NOENNIG** discussed the Jent amendments and whether to segregate them into two separate amendments. The committee decided that would be a good idea.

Motion/Vote: REP. SHOCKLEY moved to **SEGREGATE THE TWO JENT AMENDMENTS** TO **HB 77. Motion** to segregate Jent amendments **carried unanimously 18-0 voice vote.**

{Tape: 4; Side: B; Approx. Time Counter: 42 - 56}

Discussion:

REP. CLARK explained the two Jent amendments to HB 77. Committee considered both Jent amendments and took action on each one separately.

Motion/Vote: REP. GUTSCHE moved that **HB77 BE AMENDED.** (First Jent Amendment, page 3, line 25) **Motion carried unanimously 18-0 voice vote.**

Motion/Vote: REP. GUTSCHE moved that **HB 77 BE AMENDED.** (Second Jent Amendment, "a minimum of") **Motion carried unanimously 18-0 voice vote.**

Motion/Vote: REP. SHOCKLEY moved that **HB 77 AS AMENDED DO PASS. Motion carried unanimously 18-0 voice vote.**

{Tape: 4; Side: B; Approx. Time Counter: 46 - 91}

EXECUTIVE ACTION ON HB 141

Motion: REP. LANGE moved that **HB 141 DO PASS.**

{Tape: 4; Side: B; Approx. Time Counter: 152 - 154}

Discussion:

The committee discussed amendments. **REP. LANGE** suggested amending the language on page 1, line 26 of HB 141, to insert the word "knowingly" after "was" to read, "the offender was knowingly in an area of 35 mph or less."

Motion: REP. LANGE moved that **HB 141 BE AMENDED.**

{Tape: 4; Side: B; Approx. Time Counter: 155 - 171}

Discussion:

REP. NOENNIG asked REP. LANGE to explain his amendment. **REP. LANGE** responded that he believed it would be a good change. **John McMaster** replied that they added "a mental state" at REP. NOENNIG'S request. **REPS. NOENNIG, and HARRIS** discussed the language "knowingly" and whether the mental state element is necessary and whether a mental state amendment would improve the bill. **REP. LANGE** withdrew his motion to amend **HB 141.**

{Tape: 4; Side: B; Approx. Time Counter: 172 - 272}

HOUSE OF REPRESENTATIVES
Roll Call
JUDICIARY COMMITTEE

DATE 11/6/03

NAME	PRESENT	ABSENT	EXCUSED
REP. JEFF LASZLOFFY, VICE CHAIR MAJORITY	✓		
REP. PAUL CLARK, VICE CHAIR MINORITY	✓		
REP. SCOTT SALES	✓		
REP. MIKE LANGE	✓		
REP. DIANE RICE	✓		
REP. CHRISTOPHER HARRIS	✓		
REP. TOM FACEY	✓		
REP. STEVE GALLUS	✓		
REP. JOHN PARKER	✓		
REP. HOLLY RASER	✓		
REP. MARK NOENNIG	✓		
REP. BRUCE MALCOLM	✓		
REP. BILL THOMAS	✓		
REP. RON STOKER	✓		
REP. GAIL GUTSCHE	✓		
REP. GEORGE EVERETT	✓		
REP. BRAD NEWMAN	✓		
REP. JIM SHOCKLEY, CHAIRMAN	✓		

HOUSE STANDING COMMITTEE REPORT

Mr. Speaker:

We, your committee on **Judiciary** recommend that **House Bill 77** (first reading copy -- white) **do pass as amended**.

Signed: _____
Representative Jim Shockley, Chair

And, that such amendments read:

1. Title, page 1, line 6 through line 7.
Strike: "AND WHO" on line 6 through "FELONY" on line 7

2. Title, page 1, line 9 through line 10.
Strike: "AGAINST" on line 9 through "GUILTY" on line 10

3. Page 1, line 15.
Strike: "and who did not plead guilty to the felony"

4. Page 3, line 2 through line 3.
Strike: "the state" on line 2 through "crime" on line 3
Insert: "a"
Following: "laboratory" on line 3
Insert: "of the court's choice"

Strike: subsection (12) in its entirety
Renumber: subsequent subsection

7. Page 4, line 2.
Strike: "against a person who did not plead guilty"
Following: "evidence for"
Insert: "a minimum of"

8. Page 4, line 3.
Strike: "imposition of sentence"
Insert: "conviction in the case becomes final"

9. Page 4, line 4.
Strike: "imposition of sentence"
Insert: "conviction in the case becomes final"

- END -

HOUSE BILL NO. 77

INTRODUCED BY JENT

BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PROCEDURE FOR DNA TESTING OF A PERSON CONVICTED OF A FELONY WHO IS SERVING A TERM OF INCARCERATION ~~AND WHO DID NOT PLEAD GUILTY TO THE FELONY~~; AND REQUIRING THE STATE TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE THAT THE STATE HAS REASON TO BELIEVE CONTAINS DNA MATERIAL AND THAT IS OBTAINED IN CONNECTION WITH A FELONY FOR WHICH A CONVICTION IS OBTAINED ~~AGAINST A PERSON WHO DID NOT PLEAD GUILTY~~."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Petition for DNA testing.** (1) A person convicted of a felony who is serving a term of incarceration ~~and who did not plead guilty to the felony~~ may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney in the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence to be tested:

(i) was secured in relation to the trial that resulted in the conviction;

(ii) is available; and

(iii) is in a condition that would permit the requested testing;

(b) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(d) the petitioner has made a prima facie showing that the evidence sought to be tested is material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(e) the requested testing results would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction; and

(f) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must

be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney in the county of conviction. If the parties cannot agree on a laboratory, the court shall direct ~~the state crime~~ A laboratory OF THE COURT'S CHOICE to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory, IF LOCATED in this state, to give the testing priority over any other pending casework of the laboratory.

(8) The test results must be fully disclosed to the parties.

(9) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results are not favorable to the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(10) If the test results are favorable to the petitioner, the court shall order a hearing and after the hearing shall make appropriate orders pursuant to applicable statutes regarding postconviction proceedings.

(11) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

~~(12) The grant or denial of a petition or hearing under this section is not appealable.~~

~~(13)~~(12) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

NEW SECTION. **Section 2. Preservation and disposal of scientific identification evidence obtained in criminal proceeding.** (1) The state shall preserve scientific identification evidence that the state

has reason to believe contains DNA material and that is obtained in connection with a felony for which a conviction is obtained ~~against a person who did not plead guilty~~. The state shall preserve the evidence for a MINIMUM OF 3 years after the ~~imposition of sentence~~ CONVICTION IN THE CASE BECOMES FINAL or for any period beyond 3 years that is required by a court order issued within 3 years after the ~~imposition of sentence~~ CONVICTION IN THE CASE BECOMES FINAL.

(2) The state may propose to dispose of scientific identification evidence before the expiration of the time period described in subsection (1) if the state notifies the convicted person and any attorney of record for the convicted person. The notification must include a description of the scientific identification evidence, a statement that the state will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within that 120-day period, the state may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system.

(3) If a party objects to the disposition of the scientific identification evidence, the state has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

NEW SECTION. **Section 3. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 46, chapter 21, and the provisions of Title 46 apply to [sections 1 and 2].

- END -

MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 4, 2003 at 9:00 A.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 77, SB 281, SB 285, 1/30/2003
Executive Action: SB 283, SB 263

HEARING ON HB 77

Sponsor: **REP. LARRY JENT, HD 29, BOZEMAN**

Proponents: **Mike McGrath, Attorney General for the State of Montana**

Opponents: **None**

Opening Statement by Sponsor:

REP. LARRY JENT, HD 29, BOZEMAN, introduced HB 77, which provides a procedure for the courts, counsel, and prisons in regard to a claim that DNA testing would exonerate a person who has been convicted and is in prison. There are not very many of these cases. He remarked that Jimmy Baumgard spend 14 years in the Montana State Prison for a rape and murder that he did not commit. He was recently exonerated by DNA testing.

REP. JENT noted the House Judiciary Committee amended the bill and he is in support of the amendments. The bill sets criteria for testing. There needs to be a claim of innocense and a valid DNA sample. If the conditions of the original case were such that samples were not collected or preserved, testing would not be possible. The evidence must not have been tampered with, contaminated or altered. The results of the DNA testing must make a difference. Most of the cases in which DNA testing is being done include rapes or murders. Ordinarily, the cases have involve eyewitness testimony that was not reliable.

Section 1 sets out the information which needs to be in the petition. The petitioner must show the type of DNA testing being sought. The judge may order a hearing on the petition. The hearing needs to be before the judge who conducted the trial, unless that judge is unavailable. The court shall grant the hearing if it is shown the evidence to be tested is competent evidence. The identity of the perpetrator needs to be a significant issue. If previous testing has been done, it is necessary to show the new test results would be more discriminating and probative. If the parties cannot agree on a lab for the testing, the court will choose the lab. The House Judiciary Committee passed an amendment which substituted the state crime lab for a lab of the court's choice. If the state had performed an earlier test, an independent lab should test the evidence. If the tests are not favorable to the prisoner, the court may order further testing or terminate the proceeding. The court would also need to notify the Board of Pardons and Parole and place this information into the DNA index, notify the victim, and terminate the proceeding. If the tests are favorable to the

prisoner, the court would order a hearing and make the appropriate orders.

There is a three-year limit on preservation of evidence. The change made by the House Judiciary Committee added the words, "conviction in the case becomes final". This would be after the conviction came back from the Supreme Court.

Proponents' Testimony:

Mike McGrath, Attorney General for the State of Montana, rose in support of HB 77. He noted the case in Yellowstone County wherein Jimmy Braumgard was convicted of sexual intercourse without consent in 1989 and served 14 years in the Montana State Prison. He eventually put together enough evidence which persuaded his department to allow samples to be sent to an independent lab in California for DNA testing. It was determined that samples left at the scene were not Mr. Braumgard's. The evidence was retested in the state crime lab and the results mirrored the results found by the independent lab. A motion was then filed for his release because it was clear from the DNA evidence that he did not commit the crime for which he had been convicted. This was a tragic circumstance for the prisoner, his family, and the victim. It is also tragic for the law enforcement community. The last thing a prosecutor wants to do is convict the wrong person. New technology allows a review of old cases, if necessary.

This bill addresses post-conviction DNA testing. It requires a claim of innocence, a sufficient sample for testing, and the testing must make a difference in the particular case for which the conviction was made. When the bill was originally submitted, the expectation was there would be no fiscal impact. An amendment was placed in the bill by the House Judiciary Committee adding the option for the court to use an independent lab. This could involve some fiscal impact.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY asked whether using a different judge had been considered. **REP. JENT** noted the main reason for having the trial judge is because he or she would know all the facts and circumstances of the case.

CHAIRMAN DUANE GRIMES questioned whether using the first judge may present an unnecessary burden. **REP. JENT** remarked he would be willing to look at other alternatives. Any district judge

could address the issue. The first thing to be considered is the proper venue for post-conviction review. He believed it should be in the county where the person was convicted.

SEN. GARY PERRY asked whether there was a law in regard to how long the evidence needed to be kept. **REP. JENT** explained the bill stated the state shall preserve scientific identification evidence the state has reason to believe contains DNA for three years after the case becomes final. A court order may be obtained to have the evidence preserved for a longer time. **Attorney General McGrath** stated the state crime lab kept all biological specimens indefinitely. They have a fully accredited DNA laboratory and are also a member of a national DNA indexing system.

SEN. JEFF MANGAN questioned whether the results would be placed into the indexing system if the person was exonerated. **Attorney General McGrath** claimed all sex and violent offenders are tested and the results are sent to the lab and would already be placed into the data bank.

{Tape: 1; Side: B}

SEN. AUBYN CURTISS asked for more information regarding involuntary testing. **Attorney General McGrath** explained if there was probable cause to believe a particular person committed a crime and it is believed their evidence is involved in the case, a prosecutor may obtain a search warrant for a blood or urine sample to be taken.

SEN. MIKE WHEAT believed the language in the bill would allow the court discretion to decide whether or not to go forward with the petition. He maintained the court should be required to file findings of fact and conclusions of law as to why the petition was being denied. **Attorney General McGrath** claimed this was covered in Section 1(5). Subsection (4) states the court may order a hearing because most cases will be resolved short of a hearing. Subsection (5) states if the criteria is reached, the judge shall grant the petition. He added a comment in regard to the judge involved. He believed it was critical to have the trial judge, if still available, hear the case. Many of these cases involve trials that have lasted for three to four weeks. For the purpose of judicial economy, it is important to have the same judge hear the petitions for post-conviction relief. A judge must grant the petition, if the criteria is met. No one wants to convict an innocent person. If the judge does not follow the law, the appeal process is always available.

CHAIRMAN GRIMES raised a concern that the list of items under (5) was qualified by one item which is purpose of delay. **Attorney General McGrath** had a concern about the qualifier. Either the criteria was met or it was not. He believed the language addressed death penalty cases wherein prisoners filed continuous petitions for post-conviction relief. Currently the prisoners on death row are not making a claim of innocence.

SEN. WHEAT noted a prisoner who had pled guilty would need to state that he was innocent to obtain DNA testing. He questioned whether the court would need to have a separate hearing on the issue to determine if his guilty plea was given knowingly, with the consent of counsel, etc. **Attorney General McGrath** maintained that was a possibility. The House Judiciary Committee discussions involved individuals who entered into nolo contendere pleas, which are guilty pleas where the individual does not admit they actually committed the crime. Those individuals would not be included under the present bill. There was a concern in regard to a confession which may have been coerced.

Closing by Sponsor:

REP. JENT maintained no one wanted to see an innocent person in prison. DNA technology has provided the means to assure that in a few select cases, this will not happen.

HEARING ON SB 281

Sponsor: **SEN. ED BUTCHER, SD 47, WINIFRED**

Proponents: **John Foster, Property Owner**
Jim Kembel, Montana Association of Registered Land Surveyors

Opponents: **None**

Opening Statement by Sponsor:

SEN. ED BUTCHER, SD 47, WINIFRED, introduced SB 281. He remarked the bill expands and strengthens the criminal mischief sections of the code. It addresses intentional removal of survey monuments. This could involve vandalism or the case of disgruntled adjacent landowners. Several individuals have tried to have this issue prosecuted, but the county attorneys believed the statute was not clear in this regard. A criminal action needs to be treated as such. The aggrieved party should not need to go through the incredible expense of civil actions. This bill would strengthen the criminal mischief laws to provide for a felony. When a survey monument has been removed, the land must

MONTANA SENATE
2003 LEGISLATURE
JUDICIARY COMMITTEE
ATTENDANCE

DATE 2-4-03

NAME	PRESENT	EXCUSED	ABSENT
SEN. BRENT CROMLEY	✓		
SEN. AUBYN CURTISS	✓		
SEN. JEFF MANGAN	✓		
SEN. JERRY O'NEIL	✓		
SEN. GERALD PEASE	✓		
SEN. GARY PERRY	✓		
SEN. MIKE WHEAT	✓		
SEN. DAN MCGEE, VICE CHAIRMAN	✓		
SEN. DUANE GRIMES, CHAIRMAN	✓		

DATE February 4, 2003

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 77 - SB281 - SB285

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Jim Kembel	442-8684	MARLS MT ASSOC. OF REGISTERD LAND SURVEYORS	SB281	X	
John R. Foster (406)	538-9740	Self-Property Owner	SB 281	X	
Ray Williams	947-2204	State Bar of Montana			
Mike McGrath	444-2026	AG	HB77	X	
Aidan Myhre	442-6383	MT Chamber of Commerce	SB285		X
John Alke	442-3690	MT. Defense Trial Lawyer	SB285		X
Gordon Morris	2-5209	MACo	SB 285	✓	
Jacqueline Lenmark	2-0230	Am. Ins. Assn	SB285		X
Steve Weingartner	3-1160	MT Def. Trial Lawyers	SB 285		
Greg VanHorssen	2-0230	State Farm Ins. Companies	SB 285		X
AI Smith	443-3124	MTLA	SB285	X	

MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 6, 2003 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted:	HB 166, HB 170, HB 161, HB 156, 2/21/2003
Executive Action:	HB 161, HJ 1, HB 14, HB 18, HB 54, HB 77, HB 234,

SEN. WHEAT suggested including a definition that would include all the above items, but not be limited to the same.

SEN. O'NEIL suggested that on line 18, following the words "stalked person", the remainder of the sentence be stricken. A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly harassing the person.

SEN. MCGEE withdrew his motions.

Ms. Lane will work with **SENATORS MCGEE, WHEAT** and **O'NEIL** on the aforementioned amendments. Further executive action on HB 54 was postponed until a later date.

EXECUTIVE ACTION ON HB 18

Motion: SEN. MANGAN moved that HB 18 BE CONCURRED IN.

Discussion:

SEN. MCGEE pointed out the fiscal note showed $900,000 was being collected each year for the informational technology system. They also want to add another eight FTE. He believed this could be managed in a much more effective manner. Since 1995, they have been collecting close to a million dollars a year.

SEN. O'NEIL noted the computer system should be compatible with the state computer system.

SEN. MANGAN noted he was also concerned about accountability and cost containment. In this particular case, a commitment to court assumption has been made. One of the consequences of that action is an increased need for up-to-date and professional information technology.

{Tape: 3; Side: B}

Vote: Motion carried 6-3 on roll call vote with CURTISS, MCGEE, and O'NEIL voting no.

EXECUTIVE ACTION ON HB 77

Motion: SEN. WHEAT moved that HB 77 BE CONCURRED IN.

Discussion:

SEN. O'NEIL remarked that the language states the court shall grant the petition if it determines the petition is not made for the purposes of delay. The person in prison is not delaying anything. He questioned whether the court would have a reason not to consider the petition.

SEN. WHEAT maintained that persons who are incarcerated for "bad" crimes will do anything to raise an issue on appeal. If the court finds that the petition is made for the purpose of delay, the court will need to state why it has made a particular finding.

SEN. O'NEIL did not know how a prisoner could prove that something they are doing is not made for the purpose of delay.

SEN. WHEAT noted that Section 1 addressed what needed to be contained within the petition for a court to make a decision as to whether or not the petition would be granted. The granting of the petition then requires that the evidence be tested. In effect, the person filing the petition needs to set forth a certain level of factual information for the court to consider.

Vote: Motion carried 8-1 with MCGEE voting no.

EXECUTIVE ACTION ON HB 234

Motion: SEN. MANGAN moved that HB 234 BE CONCURRED IN.

Discussion:

SEN. CROMLEY supported the bill because it was limited to persons under eighteen years of age.

Motion: SEN. MCGEE moved that HB 234 BE INDEFINITELY POSTPONED.

Discussion:

Ms. Lane noted that on page 1, line 28, the word "he" should be changed. She suggested using the word "driver". **SEN. CURTISS** had suggested that the word "he" be changed to "occupant". The representative from the Montana Highway Patrol testified that they wanted it drafted that way. **Ms. Lane** noted that if an occupant threw litter out of the window, they could now stop the car. Under current law, the driver would be the one who would violate the traffic regulation.

MONTANA SENATE
2003 LEGISLATURE
JUDICIARY COMMITTEE
ATTENDANCE

DATE 3-6-03

NAME	PRESENT	EXCUSED	ABSENT
SEN. BRENT CROMLEY	✓		
SEN. AUBYN CURTISS	✓		
SEN. JEFF MANGAN	✓		
SEN. JERRY O'NEIL	✓		
SEN. GERALD PEASE	✓		
SEN. GARY PERRY	✓		
SEN. MIKE WHEAT	✓		
SEN. DAN MCGEE, VICE CHAIRMAN	✓		
SEN. DUANE GRIMES, CHAIRMAN	✓		

SENATE STANDING COMMITTEE REPORT

Mr. President:

We, your committee on **Judiciary** recommend that **House Bill 77** (third reading copy -- blue) **be concurred in.**

Signed: _____
Senator Duane Grimes, Chair

To be carried by Senator Mike Wheat

- END -

AN ACT PROVIDING A PROCEDURE FOR DNA TESTING OF A PERSON CONVICTED OF A FELONY WHO IS SERVING A TERM OF INCARCERATION; AND REQUIRING THE STATE TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE THAT THE STATE HAS REASON TO BELIEVE CONTAINS DNA MATERIAL AND THAT IS OBTAINED IN CONNECTION WITH A FELONY FOR WHICH A CONVICTION IS OBTAINED.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Petition for DNA testing. (1) A person convicted of a felony who is serving a term of incarceration may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing

information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney in the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence to be tested:

(i) was secured in relation to the trial that resulted in the conviction;

(ii) is available; and

(iii) is in a condition that would permit the requested testing;

(b) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(d) the petitioner has made a prima facie showing that the evidence sought to be tested is material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(e) the requested testing results would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction; and

(f) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney in the county of conviction. If the parties cannot agree on a laboratory, the court shall direct a laboratory

of the court's choice to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory, if located in this state, to give the testing priority over any other pending casework of the laboratory.

(8) The test results must be fully disclosed to the parties.

(9) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results are not favorable to the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(10) If the test results are favorable to the petitioner, the court shall order a hearing and after the hearing shall make appropriate orders pursuant to applicable statutes regarding postconviction proceedings.

(11) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(12) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

Section 2. Preservation and disposal of scientific identification evidence obtained in criminal proceeding. (1) The state shall preserve scientific identification evidence that the state has reason to believe contains DNA material and that is obtained in connection with a felony for which a conviction is obtained. The state shall preserve the evidence for a minimum of 3 years after the conviction in the case becomes final or for

any period beyond 3 years that is required by a court order issued within 3 years after the conviction in the case becomes final.

(2) The state may propose to dispose of scientific identification evidence before the expiration of the time period described in subsection (1) if the state notifies the convicted person and any attorney of record for the convicted person. The notification must include a description of the scientific identification evidence, a statement that the state will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within that 120-day period, the state may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system.

(3) If a party objects to the disposition of the scientific identification evidence, the state has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

Section 3. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 46, chapter 21, and the provisions of Title 46 apply to [sections 1 and 2].

- END -